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Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 603

WILLIAM L. BUCHNER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, William L. Buchner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on October 30, 1958. (App. 1a).

## CITATIONS TO THE OPINIONS BELOW

The United States District Court for the District of Columbia which found the defendant guilty after a jury trial on June 3, 1958, did not render any opinion. The per curiam opinion of the United States Court of Appeals for the District of Columbia Circuit is set forth at page 82 of the record. (App. 1a)

## JURISDICTION

The decision and judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on October 30, 1958. Petition for rehearing en banc was timely filed. Said petition was denied on the 24th day of November, 1958. (App. 2a) Petitioner timely filed an application for a stay of the mandate or to stay transmission of the certified copy of the judgment. The Court of Appeals stayed to December 26, 1958 the mandate or transmission of a certified copy of the judgment pending application to this Court for certiorari—The jurisdiction of this honorable court is invoked under 28 U. S. C. Section 1254.

## STATEMENT OF QUESTIONS PRESENTED

This case involves three questions:

(1) Can a police officer enter a private apartment house without permission from anyone in authority and without a warrant and obtain evidence which would result in the issuance of an arrest and search warrant for the occupant of a particular apartment.

(2) Did the trial court err in refusing to instruct the jury on the question of wire tapping when there was certain evidence in the record concerning the probability that some person was listening on telephone wires at the times involved in this case.

(3) Can a police officer legally obtain evidence on which to base a search warrant when said evidence is obtained by pressing against a private individual's door in a private apartment house and overhearing one person speaking. Further, whether or not the actions of the police officer constituted a trespass which would make the evidence illegal.

## STATUTES AND RULES INVOLVED

The pertinent statutes are Amendments IV and Amendment V of the Constitution of the United States. (App. 2a).

Title 47 U. S. Code page 605 (App. 3a).

Title 22 D. C. Code, section 1501; section 1502; section 1504; section 1505. (App. 4a-5a)

Title 22 D. C. Code, section 1801. (App. 6a).

Title 22 D. C. Code, section 3102. (App. 6a).

Rule 41, Federal Rules of Criminal Procedure for the United States District Courts, sections (a), (b) (c) (e). (App. 7a-8a).

## STATEMENT OF THE CASE

This case presents for correction errors of the U. S. District Court for the District of Columbia in a criminal trial of the Petitioner.

The petitioner, William L. Buchner, an individual, was indicted by a grand jury in the District of Columbia in Criminal No. 339-58, United States District Court for the District of Columbia, on the 8th day of April, 1958 (R. 1-2). He was accused of violation of Title 22, Sections 1501, 1502, 1504, and 1505 of the District of Columbia Code. These charges were respectively as follows. Operating a lottery; setting up a gaming table; permitting the maintaining of gambling premises at 2500 K Street, N. W., Apartment 301, Washington, D. C.; and possession of lottery tickets. Defendant entered a plea of not guilty to said charges (R. 2) and thereafter, within the proper time, filed a motion to suppress certain articles

that were seized when the defendant was arrested on the 12th day of February, 1958 (R. 3). Defendant filed an affidavit is support of said Motion (R. 4-5) with points and authorities attached thereto. After the hearing on the Motion to suppress the evidence, the lower court took the matter under advisement and on May 12, 1958, the court rendered a memorandum opinion denying the Motion to suppress evidence (R. 6-11). Thereafter, on, to wit, May 29, June 2 and June 3, 1958, the defendant was tried and convicted of the charges heretofore set forth. *(Infra,* p. 1)

During the trial, timely motions were made (R. 19, 20, 21, 22), by the defendant's counsel, to suppress the evidence seized on the date of the arrest, namely, February 12, 1958. The Trial Court conducted a hearing and took testimony out of the presence of the jury concerning the question of whether or not the arrest, search and seizure were valid. At the conclusion of the testimony the Court ruled against the Petitioner and allowed the prosecution to introduce all of such evidence and articles seized. (R. 19, 20, 21, 22) Timely objection was made by Petitioner's attorney to the introduction of all of said evidence at the trial (R. 47, 49, 50, 51, 59, 60).

During the course of the trial motions and objections were made by petitioners counsel which raised the following additional questions:

(a) That the court erred in refusing to instruct the jury concerning certain evidence or testimony in the record, which referred to some person or persons listening at telephone wires which could have lead to the defendant's apartment during the times which are subject of this indictment.

(b) That the court erred in admitting what a police officer heard through a door in a private apartment building and against a private individual's door and which testimony was a part of the evidence used to convict the petitioner.

Petitioner was convicted on June 3, 1958, on all four counts of the indictment, and motion for new trial was filed and a hearing held and the motion was denied. He was sentenced on the 27th day of June, 1958. As a consequence the appeal from said conviction was filed.

## REASONS FOR GRANTING THE WRIT

There is here presented an important question of Federal law involving searches and sezures under the Constitution of the United States and the Federal Rules of Criminal Procedure.

The Court below decided against the Petitioner and ruled that the hallways of a private apartment building were available to police officers for the purpose of obtaining evidence for use in obtaining a search and arrest warrant. The officer did not have permission from anyone to be in the building. This appears to be in conflict with a decision of this Court. No United States Court of Appeals has rendered any decision on this question.

In addition, the Court below also erroneously ruled that the Petitioner did not have a right to an instruction to the jury concerning wire tapping. Involved is the meaning to Title 47, United States Code section 605.

## ARGUMENT

### I

**IT IS A VIOLATION OF THE RIGHTS OF AN INDIVIDUAL UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES FOR A POLICE OFFICER TO ENTER THE HALLWAYS OF A PRIVATE APARTMENT BUILDING TO MAKE OBSERVATIONS AND, BASED THEREON, TO OBTAIN SEARCH AND ARREST WARRANTS WHEN THE OFFICER DID NOT HAVE PERMISSION TO ENTER THE BUILDING FROM THE OWNER, ANY OCCUPANT, THE PERSON OBSERVED, OR ANY AUTHORIZED AGENT.**

After indictment of the petitioner, and prior to trial, timely motion to suppress the evidence and return the seized property was filed. (R. 3) On May 2, 1958, a hearing was held before Judge Edward A. Tamm in the United States District Court on the motion. On May 12, 1958, Judge Tamm rendered a memorandum opinion, six pages in length, which denied the motion. (R. 6-11)

As will appear from the testimony of Elbert A. Andrews, Private, Metropolitan Police Department of the District of Columbia (R. 21-38) the officer made all the observations upon which the search warrant (R. p. 249) was based. His testimony indicates (R. 21-38) that he entered a private apartment house at 2500 K Street, N. W., Washington, D. C., on numerous occasions by various entrances and that at no time did he have permission from the owners, managers, petitioner, or other occupants of any apartment in the building to enter it. His admitted purpose was to make observations on Apartment No. 301, in which was subsequently found, upon the execution of the search warrant, the defendant and the articles seized in said apartment. There was no other testimony by anyone that any permission had been obtained for the police officer to be in said building.

It is the Petitioners contention that the entrance by Private Andrews on each and every occasion into the apartment building was without permission of any authorized person, occupant or the Petitioner and that the law requires that such permission must be obtained to validate the warrant, subsequent search and seizure in Apartment 301 and arrest of the defendant.

Petitioner relies on the statements contained in the concurring opinion of Mr. Justice Jackson of the United States Supreme Court in the case of *McDonald* v. *United States*, 335 U. S. 451, where at page 453 of the opinion he said:

> "It seems to me that each tenant of a building, while he has no right to exclude from the common hallways those who enter lawfully, does have a personal and constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entering."

See Title 22 Section 180 the District of Columbia Code (App. 6a).

Title 22, Section 3102 of the District of Columbia Code, (App. 6a) Petitioner contends, comples the conclusion that Officer Andrews, in the instant case had no more right to enter the building than the officers in the case of *McDonald* v. *U. S., infra.*

The pertinent portion of said statute states,

> "Any person who, without lawful authority, shall enter, or attempt to enter, a private dwelling or building against the will of the lawful occupant thereof, or being therein, without lawful authority to remain therein, without lawful authority to remain therein, shall refuse to quit the same on the demand of the lawful occupant there-

of, * * *, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished * * *"

Petitioner believes that because Officer Andrews did not have lawful authority to enter the building, and constructively was there against the will of the occupants, the owner and/or agents of the owner, and also against the will of the Petitioner herein who was the occupant of Apartment 301, that the search warrant was illegal and as a consequence articles seized were wrongfully seized; that the Petitioner was wrongfully arrested, and that the testimony of Private Andrews, Officer Kissner, Officer Foran and Officer Layton was wrongfully admitted as to what was found in the apartment.

Although the *McDonald* case *infra* had a slightly different factual basis, the law enunciated by Justice Jackson should apply to this case.

This is particularly so because Justice Jackson in writing what he did specifically set forth that he believed, that the court should make clear the reason why the arrest in that case was invalid.[1]

On page 458 of his concurring opinion, he said, *inter alia,*

"Had the police been admitted as guests of another tenant or had the approaches been thrown open by an obliging land lady or doorman, they would have been legally in the hallways. * * *"

[1] In the *McDonald* case, Mr. Justice Jackson concurring said "I agree with the result and with the opinion of the court. But it rejects the search which two courts below have sustained without saying wherein it was wrong. It may be helpful to lower courts and to the police themselves to state what appears to some of us as the reason this search is bad."

Certainly, considering the prohibitions contained in Title 22. Section 3102 of the District of Columbia Code (App. 6a) and the interpretation of Justice Jackson in the *McDonald* case, the Officer (Andrews) had no right in the building at the times he made the observations of Apartment 301; this also included the overhearing of the voice of the Petitioner through the doorway of Apartment 301. These actions were not legal and all of said evidence should be suppressed. Since the search warrant of premises Apartment 301 and the arrest warrant for the Petitioner was based solely on these observations and the overheard statements, any evidence obtained thereafter was invalid.

Certain other cases come to mind which have dealt with, in general, the same problem.

The lower court in overruling Petitioner's Motion to Suppress evidence relied most heavily on the case of *U. S.* v. *Hayden* (140 Fed. Supp. 429) which was decided May 1, 1956 by the United States District Court for the District of Maryland (R. 6-11). That case was one involving violation of the alcohol and tobacco tax laws. The Defendant in the case was known by investigators to be a major violator. They also learned that he had a certain truck that he used to transport liquor. The police then began to observe the defendant's activities for a number of months. Finally, one of the agents who had been keeping the defendant under observation saw that the defendant's personal car was in front of a dry cleaning plant owned by him and that the truck was gone. The agent finally located the truck and followed it for a while and then lost it. He returned to the cleaning plant and saw the truck parked in the driveway. He looked through the rear window of the truck and saw a partially cov-

ered cardboard container which was the type and size customarily used to carry jars of illegal liquor. He also detected the odor of liquor. He then notified his superior who, upon his arrival, also looked into the truck through the rear window. Observation was then continued on the premises from across the street. The following morning the defendant arrived at the premises, entered the truck and backed it into an open shed. He then opened the rear door and carried a carton from the truck into the shed. The officers then drove onto the defendant's property and questioned him. One of the officers saw in the rear of the shed a carton covered by a burlap bag. Defendant was arrested and some non-tax paid liquor was found in the carton and seized. The officers did not have a warrant. The court ruled that a warrant was not necessary and that the arrest, search and seizure were proper.

The court in deciding the case relied in part on the following decisions:

*Jones* v. *U. S.* (1924) 296 F. 632;
*Benton* v. *U. S.* (1928) 28 F. 2d 695;
*Janney* v. *U. S.* (1953) 206 F. 2d 601;
*U. S.* v. *Williams* (1955) 227 F. 2d 149.

All of these cases involved mere entry and observation on land of the different defendants.

The lower Court was careful to point out that actions of officers in open fields have been expressly excluded from the purview of the 4th Amendment. It cited *Hester* v. *U. S.* (1924) 265 U. S. 57; 44 S. Ct. 445; 68 L. Ed. 898.

Consider the language of the 4th Amendment which states *inter alia*, "The rights of the people to be

secure in their persons, *houses*, papers and effects against unreasonable searches and seizures shall not be violated * * *." (Emphasis supplied.) This seems to make it clear that this case is entirely different from the matter before the court.

The lower Court further relied on *Whitley* v. *U. S.* (1956) 99 U. S. App. D. C. 159, 237 F. 2d 787. In that case the police entered a rooming house, noticed a person in the bathroom on the 3rd floor and then entered the bathroom and arrested her. They then went through a window from the bathroom to a porch and from the porch they looked into a bedroom and saw a person named Meredith preparing to give herself a hypodermic injection. They entered the bedroom, searched it, and found narcotics. In that case the Court said:

> "The arrest of Meredith, also, does not appear to have been legal and therefore does not justify the search and seizure. Since the porch from which the police saw Meredith was not open to the public, and the police reached it through a window, they had no right to be on the porch, whatever may be thought of their previous presence in the relatively public corridors of the rooming house. It follows that what they saw from the porch, even if it gave them probable cause to believe that Meredith had committed a felony, did not justify them in arresting her." *McDonald* v. *U. S.*, 335 U. S. 451; 69 S. Ct. 191; 93 L. Ed. 153.

The Court appears in the *Whitley* case to have followed the *McDonald* case without specifically ruling on the significance of the officers' presence in the corridors of the rooming house. Appellant can only assume that this court did follow the reasoning of Justice

Jackson, which was concurred in by Justice Frankfurter, concerning presence without right in the corridors of a private apartment house.

In the case of *U. S.* v. *Jeffers*, 342 U. S. 48; 96 L. Ed. 59; 72 S. Ct. 93, officers were let into a hotel room by the manager because they suspected that narcotics were secreted there. This was not the room of the defendant but he had permission from its lawful occupant to use it. Under these circumstances, the court ruled the search illegal. The Court said, *inter alia*,

> "* * * The officer not only proceeded without a warrant or other legal authority but their intrusion was conducted surreptitiously and by means denounced as criminal."

Following this reasoning, it would seem that the officer in the instant case who made the observations in the hallway of a private apartment house was just as surreptitious.

In the *McDonald* case, (*infra*, p. 14) Defendant McDonald was under observation for suspected violation of the lottery laws. While he was maintaining a home in the District of Columbia, he rented a room in a rooming house in the District. Police observed him for about 2 months. On the day of the arrest, in the middle of the afternoon three officers were outside the premises and heard an adding machine. Believing that the numbers game was in process they sought admission to the house. One of the officers found a window leading to the landlady's room and climbed through it. He identified himself to her and admitted the others. Coming to the closed doorway of the room occupied by the defendant on the 2nd floor they stood on a chair, looked through the transom and observed the

defendant in the room as well as number slips, money and adding machines. They yelled to the defendant to open the door and he did so. An arrest and search followed.

Finally, in *Silverthorne Lumber Company* vs. *U. S.*, 40 S. Ct. 182; 251 U. S. 385; 64 L. Ed. 319, Mr. Justice Holmes wrote in part,

> "* * * The essence of a provision forbidding the acquisition of evidence in a certain way is not that mere evidence so acquired shall not be used before the Court but that it shall not be used at all. * * *"

II

**EVIDENCE HAVING BEEN INTRODUCED ON THE PART OF THE DEFENDANT, RAISING THE DEFENSE OF ILLEGALLY OBTAINED EVIDENCE, i.e. "WIRETAPPING"; DEFENDANT WAS ENTITLED TO HAVE INSTRUCTIONS TO THE JURY COVERING THE ISSUE.**

During the trial, the Petitioner produced the testimony of Randolph Shorter. (R. 38-48) He testified that he was the janitor who worked at 2500 K Street, N. W., and that on one of the days when Officer Andrews was observing the premises, he saw a man he could not identify by name, in the basement of the apartment house with lines attached to a telephone panel and with earphones over his head. From this the jury could have assumed that the person was listening on a telephone wire. He further testified that some of the wires in the box led to apartment 301. He stated that he could identify the person if he ever saw him again. From his testimony it also could be concluded that the person seen was not a telephone company employee, since he did not have any identifying badges on his clothing, nor did he have any equipment by way of tools, work belts, or any other thing

which would lead to a conclusion that it was a telephone company employee.

By this testimony, there was a question of fact as to whether or not the defendants' telephone lines were tapped illegally against the requirements and in violation of section 605, title 47 of the United States Code (App. 3a) which prohibits the interception of telephone communications, without permission. The defendant appellant was entitled to a requested jury instruction which he submitted at the proper time, and which was refused by the Court and which stated as follows:

DEFENDANT'S INSTRUCTION NO. 6

"Title 47, Section 605 of the United States Code prohibits the use of any information received as the result of any so-called 'wire-tapping.'" If you find, in this case that such information so received became the basis of any evidence in this case, then you must acquit the defendant on all counts of the indictment."

Under the law, once relevant testimony has been admitted for consideration by a jury, the court is required to give instruction, when requested, covering said evidence.

The testimony of Randolph Shorter was not objected to by the prosecution and was therefore a matter the jury could consider. Appropriate instructions should have been made covering this testimony.

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[2] *U. S.* v. *Coplan*, C. A. N. Y. 1950, 185 F. 2d 629, cert. den. 72 S. Ct. 362, 342 U. S. 920, 96 L. Ed. 690, held that wire tapping is forbidden by this section and evidence obtained may not be used against a victim of this violation.

The time or apparent time of the occurrence, as testified to by the witness, was during the same period when Officer Andrews was obtaining the evidence he testified about in the apartment building. Randall's instructions to juries states in vol. 1, page 301—Section 318:

> "Where there is evidence in a criminal case reasonably raising a defensive issue, the defendant is entitled to instructions affirmatively presenting such issue."
>
> See *Key* v. *State*, (Texas) 161 S. W. 130;
> *Tatum* v. *U. S.* (1951) 88 U. S. Appeals D. C. 386, 190 F. 2d 612;
> *Lufty* v. *U. S.* (9 Cir.) (1952) 198 F. 2d 760, 33 A. L. R. 2d 879;
> *Kinard* v. *U. S.* (1938) 68 App. D. C. 250, 96 F. 2d 522;
> *U. S.* v. *Blount* (1956) 229 F. 2(d) 669;
> 53 Am. Jur. Section 580 and 650;
> *Bird* v. *U. S.*, 180 U. S. 356, 21 S. Ct. 403, 45 L. Ed. 570.

Petitioner by his motion for a new trial raised all of the above questions and the motion was denied. In addition on the motion for a new trial Petitioner contended, and he believes rightfully so, that because of the testimony of Officer Andrews (R. 21-38), that his ear was in physical contact with the door of Apartment 301, which was occupied by the Petitioner, that this constituted a trespass, since the officer testified that he did not have the permission of anyone, including the Petitioner, to be in the building or at the door.

In the argument herein (*infra*, page 10) *McDonald* vs. *U. S.* has been discussed in detail wherein Justice Jackson in his concurring opinion held that, *inter alia*,

"Had the police been admitted as guests of another tenant or had the approaches been thrown open by an obliging landlady or doorman, they would have been legally in the hallways. Like any other stranger they could then spy on every tenant or others without being trespassers. * * *"

Certainly the inference, from the above quotation, is that a trespasser could not obtain legal evidence. Since Officer Andrews in his testimony has stated that he had his ear against the door of the Petitioner's premises, then he committed a trespass and this makes what he heard illegally obtained evidence.

To reverse the first sentence of the above quotation it seems Justice Jackson says that, in the absence of permission from an obliging landlady or any other tenant or doorman, the Officer would have been illegally in the hallway.

## CONCLUSION

The court below erred in failing to exclude the testimony of the police officers, the allowance of the testimony being a violation of the provisions concerning unreasonable searches and seizures and due process of law as contained in Amendments Four and Five of the Constitution of the United States. It was further a violation of the provisions of Rule 41 of the Federal Rules of Criminal Procedure.

Further error was committed when the Court failed to instruct the jury concerning the evidence of wire tapping which was present in the testimony. From all of the foregoing the verdict of the Court below should be reversed.

Respectfully submitted,

JOHN R. FITZPATRICK
EDWARD J. LYNCH